IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No.

In the Matter of

PITTSBURGH TERMINAL COAL CORPORATION,
Debtor.

ALEXANDER GUTTMANN, Individually and as Chairman of the Protective Committee for Preferred Stockholders of Pittsburgh Terminal Coal Corporation, HOWARD S. GUTTMANN, IRENE GUTTMANN, RUDOLPH GUTTMANN, MONROE GUTTMANN and ELIZABETH WOLFERS,

Petitioners,

against

PITTSBURGH TERMINAL COAL CORPORATION, Debtor; WILLIAM G. HEINER, as Trustee of Pittsburgh Terminal Coal Corporation, Debtor; UNION TRUST COMPANY OF PITTSBURGH, Successor Trustee for Bondholders of Pittsburgh Terminal Coal Corporation; THE PITTSBURGH AND WEST VIRGINIA RAILWAY COMPANY; and NORTH AMERICAN COAL CORPORATION,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinions Below

The opinions of Honorable Watson B. Adair, Referee in Bankruptcy (53a, 64a), both dated September 11, 1941,

are not reported. The opinion of the District Court, Gibson, J., filed March 13, 1942 (78a), is not reported. The opinion of the Circuit Court of Appeals filed October 13, 1942, is reported in 130 F. (2d) 872. Copies of all said opinions are annexed to the Petition.

II

Jurisdiction

1. The statutory provision believed to sustain the jurisdiction of this Court is referred to under Heading A, page 6 of the Petition.

2. The case presents no issue of fact, since all facts alleged in Petitioners' proofs of claim are admitted by Respondents' denial of the insufficiency thereof in law. The sole issues are as to the construction of the Pennsylvania Corporation Law and the relevant provisions of the Chandler Act.

III

Statement of the Case

A full statement of the case has been made under Heading A, page 2 of the Petition.

IV

Specification of Errors

1. The Court erred in not holding that Petitioners were entitled to prove as creditors to the extent of 7¢ per ton of coal mined up to the date of the filing of the Petition for reorganization herein, and in addition either (a) 7¢ per ton for each ton of coal mined or mineable subsequent

to the date of the filing of the Petition, or (b) such an amount as would equal 7¢ per ton upon all the unmined coal at the date of the filing of the Petition—but in no event in excess of the par value or principal amount of their Preferred Stock plus accumulated dividends or interest.

2. The Court erred in not holding that Petitioners were secured by way of equitable lien or otherwise upon the coal lands, and in not holding that the coal lands, and in addition (a) 7¢ per ton of coal mined or mineable therefrom subsequent to the filing of the Petition herein, or (b) 7¢ per ton with respect to each ton of coal susceptible of being mined on the date of the Petition for reorganization, constituted a trust fund in the hands of the Trustee of the Debtor for the benefit of the Preferred Stockholders.

3. The Court erred in not holding that Petitioners were entitled to a trial upon the question of whether or not the Debtor could have made the sinking fund payments without prejudice to its creditors and stockholders, and as to whether or not the remaining assets of the Debtor were more than sufficient to pay all debts and known liabilities at the times when payments into the sinking fund were due.

V

Summary of the Argument

POINT A

The sinking fund provisions upon the Preferred Stock Certificates gave rise to a claim against the Debtor for 7¢ per ~~pound~~ ton of coal mined; failure by the Debtor to make that payment gave rise to a right of action, of which petitioners could not be deprived by the intervening petition for reorganization.

POINT B

Claimants are entitled to prove as secured and preferred creditors.

POINT C

The claims are provable in this proceeding, at least to the extent to which they existed on the date of the filing and approval of the petition, and also, in addition either (a) 7¢ per ton with respect to the number of tons in the ground on the date of the filing, or (b) with respect to 7¢ per ton for each ton subsequently mined.

The decision of the Court below unconstitutionally deprived claimants of their property without due process of law and without compensation.

POINT D

The decision in *In re Pittsburgh Terminal Coal Corporation*, 30 Fed. Supp. 106, 109 Fed. (2d) 1020, is neither applicable nor controlling and the Court below erred in relying thereon.

VI

ARGUMENT

POINT A

The sinking fund provisions upon the Preferred Stock Certificates gave rise to a claim against the Debtor for 7¢ per ~~pound~~ ton of coal mined: failure by the Debtor to make that payment gave rise to a right of action, of which petitioners could not be deprived by the intervening petition for reorganization.

Although it is a general rule that a preferred stockholder is merely a part owner of the corporation in which he holds stock, and is not a creditor of the corporation by virtue of that naked fact, situations may and do arise (as at bar) where such holder achieves a creditor status in addition to or in part substitution for the stockholder status.

Some classic illustrations, somewhat comparable to the case at bar, where a stockholder may achieve a creditor status, are as follows:

1. Where a corporation declares dividends on its stock, the holder of the stock certificate becomes a creditor to the extent of the dividend declared even though the creditor relationship springs from his previous relation as a stockholder, and in such a case (even in insolvency) the stockholder becomes a creditor in the amount of the dividend in addition to his status as stockholder. *Gerdes on Corporate Reorganizations,* Vol. 2, §636 and cases there cited; *Bryan* v. *Welch,* 74 Fed. (2d) 964 (C. C. A. 10th, 1935); *In re Interborough Consol. Corp.,* 267 Fed. 914 (D. C, S. D. N. Y., 1920); *Sinclair Cuba Oil Co. S. A.* v. *Manati Sugar Co., et al.,* 2 Fed. Supp. 240 (D. C., S. D. N. Y., 1932); *Steel Cities Chemical Co.* v. *Virginia-Carolina Chemical Company,* 7 Fed. (2d) 280 (C. C. A. 2nd, 1925).

2. Where a corporation makes a promise to redeem its preferred stock and subsequently fails to execute that promise at the appointed time. This substantially is the case at bar. In such a case, the promise to redeem gives rise to an enforcible claim by the holder of the preferred stock in a capacity as creditor. *Richards* v. *Wiener*, 207 N. Y. 59, 100 N. E. 592 (1912); *Peoples-Pittsburgh Trust Co.* v. *Pittsburgh United Corp.*, 338 Pa. 328, 12 Atl. (2d) 430 (1940; reargument dismissed, 1940); *Browne* v. *St. Paul Plow Works*, 62 Minn. 90, 64 N. W. 66 (1895), at p. 67.

The case at bar must be differentiated from those cases in which dividends are payable out of surplus earnings only or in which the redemption date comes at a time when the corporation was insolvent. Dividends are subject to two contingencies—(a) declaration by the Board of Directors, and (b) the existence of a surplus at the time of declaration. At bar, the payment into the sinking fund was not dependent upon any declaration by the Debtor, but was automatic under the terms of the Merger Agreement. Payments into the sinking fund were also to be made irrespective of the existence of any surplus, and were susceptible of being fixed and determined upon each quarterly date in accordance with the number of tons of coal mined. The obligation (of the corporation to pay into the sinking fund) is therefore analogous to that which arises upon a declared dividend or to a redemption at a time when the corporation is solvent.

At bar, the preferred stockholders become creditors in substitution for their stock position, to the extent of the payments provided to be made into the sinking fund; and if the payments provided to be made into the sinking fund would not discharge par and dividends, they become creditors to the extent of such provided payments, and remain stockholders for the balance.

Therefore, such cases as *In re Piccadilly Realty Co.*, 78 Fed. (2d) 257 (C. C. A. 7th, 1935) (where payments were expressly to be made out of surplus profits and where there were neither surplus nor profits out of which payments

might be made), and *In re Arcadia Furniture* Co., 12 Fed. Supp. 477 (D. C., W. D. Mich., S. D., 1935) (where the same situation existed), have no application.

Nor do cases like *Spencer* v. *Smith,* 201 Fed. 647 (C. C. A. 8th, 1912) (where the *redemption date* did not arrive until *subsequent* to the bankruptcy), or the construction which respondents place upon *Warren* v. *King,* 108 U. S. 389 (1883) (where the preferred stock was to be payable "after its* indebtedness"), have any application to the facts at bar.

The correct approach, in the construction of the Pennsylvania statute involved, was taken by the Supreme Court of Pennsylvania in *Peoples-Pittsburgh Trust Co.* v. *Pittsburgh United Corp., supra.* There a trust agreement was made providing for redemption of preferred stock whereby the corporation's assets on the redemption date were to be applied by the trustee first to the payment of all claims accrued prior to such time, and then to the payment of the preferred stock, with the balance to be returned to the corporation. Because of the decrease in the value of the corporation's assets after the redemption date, no assets were available to pay subsequent creditors on the date of actual redemption, although on the agreed redemption debt a large balance over the amount required to retire the preferred stock was available to the corporation. Creditors objected to the redemption.

The Court posed the question (p. 433):

> "Would performance of the agreement on March 1st (the redemption date) have left the corporation solvent?"

It then answers the same question as follows (p. 433):

> "If it would, and there is no doubt of that fact, there was no breach of the statute and appellants can take nothing by their appeals."

In the case at bar it is admitted (for the purposes of this record at least) that the payments into the sinking fund

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* The corporation's.

would have left the Corporation solvent on the sinking fund dates, and Petitioners' claims should have been allowed.

See, also, *Warren* v. *Queen,* 240 Pa. 154, 87 Atl. 595 (1913). In that case the converse of the situation at bar was presented. The affidavit of defendant stated that there were no funds or property with which to redeem the shares of stock without injustice to the existing creditors and other stockholders.

The Court held that if these facts were "sustained on the trial of the cause" they would prevent a recovery, clearly indicating that if solvency is admitted the payments could and should have been made, and further clearly indicating that the claimants were entitled to a trial upon the issue of solvency.

Upon any such trial of the issue of solvency, the burden of proving insolvency is upon the Debtor. *Warren* v. *Queen, supra; Richards* v. *Wiener, supra.*

In this connection, it is especially to be noted that, contrary to the assumptions which have been indulged in by respondents below, there is no allegation or proof of insolvency in the record. The mere filing of a petition under the Chandler Act does not denote insolvency. In fact, the Petition herein is founded upon inability of the Debtor to pay its debts rather than upon insolvency, so that upon that state of the record (coupled with the fact that the allegations of solvency in the proofs of claim are admitted by the pleadings herein) the Debtor Corporation stands before this Court as fully solvent at the times the payments into the sinking fund were due—and, in fact, also, even at the present time. Thus the Debtor was not and is not legally debarred from discharging its obligation to the Preferred Stockholders under the sinking fund provisions, both those which arose before the filing of the Petition for Reorganization, as well as those which arose thereafter.

In *101 A. L. R. 154,* et seq., there is a note discussing in general the validity and enforcibility of agreements by a corporation to repurchase its own stock. At page 158, it is mentioned that such repurchase may be accomplished if the

corporation is not insolvent on the purchase date, citing many cases, including the following Pennsylvania cases:

Wolf v. *Excelsior Automatic Scale & Supply Co.*, 270 Pa. 547, 113 A. 569 (1921);

Smith v. *Citizens Ins. & Mortgage Co.*, 284 Pa. 380, 131 Atl. 191 (1925).

See further 1 *Thompson on Corporations*, 2d Ed., Sec. 321, page 356—Interpretation and Amendment of Charters—citing *The Binghamton Bridge Co.*, 3 Wall. 51, 70 U. S. 51 (1865); see, also, *Fletcher, Cyc. Corp.*, Vol. II, §5291 and cases cited.

It is, therefore, apparent that the Court below decided an important question of Pennsylvania law in direct conflict with the applicable local decisions.

POINT B

Claimants are entitled to prove as secured and preferred creditors.

The agreement with the Preferred Stockholders dealt with and related to specific property, viz., a tract of land and the coal to be mined therefrom and the payment to be made with respect thereto. An agreement to pay out of such fund is valid and enforcible. 3 *Pomeroy's Equity Juris.*, 4th Ed., pp. 2961-2965; *Pomeroy*, p. 2976, Sec. 1238.

See also:

Union Trust Company v. *Bulkeley*, 150 Fed. 510 (C. C. A. 6th, 1907), (where a parol assignment was held to create a valid lien against the assignor's trustee in bankruptcy);

Corney v. *Saltzman*, 22 Fed. (2d) 268 (C. C. A. 2nd, 1927) (where an equitable lien arising from an agreement was held to make a mortgage enforcible even against a trustee in bankruptcy, if the lien arises out of an agreement which confines security to a specific *res* and purports to give an absolute present right);

Voltz v. *Treadway,* 59 Fed. (2d) 643 (C. C. A. 6th, 1932) (where a parol assignment of a bankrupt of funds to be collected in the future, was held to create an equitable lien thereon, valid as against the trustee in bankruptcy, though the funds were collected after adjudication).

POINT C

The claims are provable in this proceeding, at least to the extent to which they existed on the date of the filing and approval of the petition, and also, in addition either (a) 7¢ per ton with respect to the number of tons in the ground on the date of the filing, or (b) with respect to 7¢ per ton for each ton subsequently mined.

The decision of the Court below unconstitutionally deprived claimants of their property without due process of law and without compensation.

The claims at bar are susceptible of liquidation and may be proved under Section 63 of the Bankruptcy Law.

Thus in *Maynard* v. *Elliott,* 283 U. S. 273, 51 Sup. Ct. 390 (1931), this Court said at page 275:

> "* * * it is now settled that claims founded upon a contract, which at the time of bankruptcy are fixed in amount or susceptible of liquidation, may be proved under subdivision (a) (4) of that section,* although not absolutely owing when the petition is filed."

See further *In re Simon,* 197 Fed. 105 (D. C. W. D. N. Y., 1912); *Board of County Commissioners* v. *Hurley,* 169 Fed. 92 (C. C. A. 8th, 1909).

In *Central Trust Co. of Illinois* v. *Chicago Auditorium Association,* 240 U. S. 581, 36 Sup. Ct. 412 (1916), this Court had for construction a contract whereby the Association had granted the right to transfer and carry baggage and passengers. The Trustee in Bankruptcy did not assume performance of the contract.

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* Referring to the Bankruptcy Act, Section 63.

This Court held (p. 589) that the promisor has a right to maintain an action at once for the damage occasioned by such anticipatory breach.

In other words, the claims of claimants herein as creditors became crystallized as of the time when the payment should have been made into the sinking fund and their right of action to further payments became crystallized on the date of the filing of the Petition for Reorganization. Their contract rights must then be determined as to those respective dates. The mere filing of the Petition could not wipe out rights which had already sprung into existence.

The Referee below impliedly agrees that but for the reorganization proceedings Petitioners would be entitled to prove their claims, for he says (61a):

> "It may be that but for the pendency of the present proceeding the preferred stockholders could bring some sort of proceeding to enforce the provisions of paragraph 5."

If this be so, how could they be altogether deprived of the value of their claims?

The bankruptcy statute could measure the final allocation upon the claim, measured by the assets available therefor or pledged therefor; it could not, and did not, extinguish the claim itself.

Fifth Amendment, *U. S. Constitution,* 2 U. S. Const. Anno., p. 517;

Article 1, Sec. 9, *Pa. Constitution,* P. S. Const., p. 38;

Article 1, Sec. 17, *Pa. Constitution,* P. S. Const., p. 39;

Louisville Joint Stock Land Bank v. *Radford,* 295 U. S. 555, 55 Sup. Ct. 854 (1935);

Central Trust Company of Illinois v. *Chicago Auditorium Association,* 240 U. S. 581, 36 Sup. Ct. 412 (1916);

City Bank Farmers Trust Co. v. *Irving Trust Co.,* 299 U. S. 433, 57 Sup. Ct. 292 (1937);

Yoakam v. *Providence Biltimore Hotel Co.,* 34 Fed. (2d) 533 (D. C. D. R. I. 1929);
In re Jordan, 2 Fed. 319 (D. C. D. Me. 1880).

The deprivation by the Court below of Claimants' crystallized rights was unconstitutional and deprived Claimants of their property without due process of law and without compensation.

The Court below has therefore decided a question of Federal law which has not yet been, but should be, settled by this Court, and in a way probably in conflict with the applicable decisions of this Court.

POINT D

The decision in *In re Pittsburgh Terminal Coal Corporation*, 30 Fed. Supp. 106, 109 Fed. (2d) 1020, is neither applicable nor controlling and the Court below erred in relying thereon.

In *In re Pittsburgh Terminal Coal Corporation, supra,* Preferred Stockholders of the Debtor filed a petition for reorganization under the Chandler Act. The Petition itself was founded upon the claims of the Preferred Stockholders, *qua* stockholders, on the ground that the instrument itself, instead of being a certificate for preferred stock, was in fact a certificate of indebtedness. See transcript of the Record on said appeal (C. C. A. 3d, No. 7273, October Term, 1939).

The District Court, dismissing the Petition, stated that the "sole basis of the claim of each petitioner arose from his status as a stockholder. As such he is plainly precluded from being a participant in the filing of an involuntary petition against the alleged debtor corporation" (p. 107).

The Referee in the case at bar (62a, 63a) expressly states that the opinion in 30 Fed. Supp. 106 (cited by the Referee as 30 Fed. Supp. 108) "does not expressly refer to the contention, now made, based upon the sinking fund provision, a contention" says the Referee "which would have been useless in the former proceeding because under Section 126 of the Act a creditor is not eligible to be a *petitioning creditor* unless his claim is liquidated as to amount and not contingent as to liability" (italics ours).

The decision in the former case merely went to the extent of holding that the petitioners in that case, as stockholders, were not "petitioning creditors" within the definition of the Chandler Act. Their status as creditors under the sinking fund provision was not raised by the Petition and was not before the Court, which is the question here involved.

The opinion in the former case did not go to the extent, and it was quite apparently not intended to go to that extent, of holding that the Preferred Stockholders were not and could not be creditors at all. The Court there decided the issues as presented to it, and the Petitioners having presented the issue as to whether the certificate of preferred stock was in fact a certificate of indebtedness, as distinguished from a preferred stock certificate, the Court made its decision upon that set of facts.

The Court did not decide, and there was not presented to the Court by the Petition, the question as to whether or not the sinking fund provisions quoted at pages 2-3 of the Petition for Certiorari in fact gave a creditor status to the Preferred Stockholders.

The determination in the previous case was based upon the ground that the claims had not yet been liquidated as to amount, and that, therefore, the Petitioners for reorganization in that case did not qualify as "petitioning creditors" within the definition of §126 of the Chandler Act.

Judge Gibson himself, in the opinion in that case (30 Fed. Supp. at 107) apparently expressly rests his dismissal of the Petition upon that ground, for he says:

> "The original and supplemental petitions, failing as they do to disclose *petitioners authorized to sign them,* must be dismissed." (Italics ours.)

In using the words "authorized to sign", Judge Gibson was not referring to the legal authority of those Petitioners to sign that Petition, but was actually referring to their legal capacity to sign as *"petitioning creditors"* under §126 of the Chandler Act.

There is a distinction between *"creditors"* whose claims may be proven in bankruptcy and *"petitioning creditors"* authorized to file a petition for reorganization. A determination in the previous case that the Petitioners there were not authorized to sign the Petition because their claims had not been liquidated as to amount is not and cannot be applicable or controlling in this case, which is a proceeding for the very purpose of liquidating the amounts of the claims.

The decision in *In re Pittsburgh Terminal Coal Corporation,* 30 Fed. Supp. 106, 109 Fed. (2d) 1020, is, therefore, neither applicable to nor controlling upon the situation at bar, and if it be held to be applicable we submit that it is erroneous and the reasoning thereof should be overruled by this Court.

CONCLUSION

It is respectfully submitted that this case presents in a clean-cut manner (a) an importation question of Pennsylvania law decided by the Court below in direct conflict with the applicable local decisions; and (b) an important question of Federal law which has not been but should be settled by this Court, and which has been decided by the Court below in a way probably in conflict wtih the applicable decisions of this Court; and that this Court should review the decision of the Circuit Court of Appeals for the Third Circuit and finally reverse it.

It is, therefore, respectfully submitted that a Writ of Certiorari be issued out of this Honorable Court to the Circuit Court of Appeals for the Third Circuit.

Dated, New York, December 29, 1942.

Respectfully submitted,

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NATHAN D. LEIMAN,
Counsel for Petitioners.